No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

APPELLANT'S BRIEF ON MOTION TO DISMISS OR AFFIRM.

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

APPELLANT'S BRIEF ON MOTION TO DISMISS OR AFFIRM.

Statement.

This motion to dismiss or affirm raises no ground for dismissal other than a claim of insubstantiality of the question.

Although two questions are sought to be brought before the Court upon this appeal, jurisdiction by appeal rests only on the question of Federal preemption, since that is the only question involving repugnancy of state statutes. It is worthy of note that no claim is made that a prior decision of this Court squarely disposes of the question of preemption adversely to Appellant's contention.

The following comments on the motion follow the Respondent's presentation *seriatim*, being limited, how-

ever, to the preemption question which is the foundation of the appeal.

Argument.

(Resp., p. 9) The phraseology "Subdivision (c) exempts certain types of payments not here relevant . . ." is an effort to de-emphasize a salient feature of Section 302 of the Taft-Hartley Act, namely, that it is a complete substantive regulation of the matter of payments between employers and representatives; complete in what it authorizes and complete in what it prohibits. This has a material bearing on the question of whether concurrent state regulation is permissible.

(Resp., p. 9) While the fact that the same act may be subjected to both state and federal penalties does not necessarily augur preemption, neither is it a benediction upon the power of a state to deal with matters upon which the Congress has spoken. It is to be noted that Section 302 of Taft-Hartley envisages, although perhaps not exclusively, the protection and integrity of a relationship created by Sections 7 and 9 of the NLRA. While it is recognized that the term "representative" as used in Section 302 is broader than the term as used in Sections 7 and 9*, nevertheless there remains the basic fact that Section 302 does comprehend representatives within the meaning of Sections 7 and 9 and the Respondent's argument thus involves, at least in part, a contention that the state may regulate a relationship of federal statutory creation.

In the *Zook*** case the relationship as such was not sought to be regulated; it was the absence of a federal relationship, i. e., the non-possession of an ICC Certificate, which

---

* *U. S. v. Ryan* (1956), 350 U. S. 299.

** *California v. Zook* (1949), 336 U. S. 729.

was penalized. The *Zook* case would furnish an analogy here if the New York State statutes penalized such matters as receiving moneys upon a fraudulent claim that a person was in fact a representative. The New York statutes here in issue go beyond *Zook* in that they actually attempt to mandate a representative whose duties and tenure depend on federal statutes to observe a standard of conduct set up by New York in a matter for which the Congress has provided the standard.

While bribery is a subject which has been traditionally regulated by the criminal laws of the states, it must be recognized that the crime of bribery depends upon the existence of an official status which, in most cases, is created by the state. In the case at bar, the status is one which is created by the federal statute. It cannot be said of the case at bar, as is said in the counterfeiting cases* the violent picketing cases** and others, that a given course of conduct affects a particular state in an aspect not necessarily related to the federal delict; in the labor relations field, if a representative exacts or receives moneys for a dereliction of duty, the effect is upon federal labor relations and only upon federal labor relations, because the performance of the representative's duty is no concern of the state.

(Resp., p. 10) The resort by Respondent to the legislative history of the Act serves to point up the fact that the question tendered is, indeed, substantial. That a question is not resolvable upon the face of a statute demonstrates forcefully that it is a question of substance.

(Resp., p. 11) The quotation from *U. S.* v. *Brennan*† emphasizing the purpose of Section 302 to "preserve the integrity of the labor-management relationship by pro-

---

* *U. S.* v. *Marigold*, 9 How. 560, 568, 569.

** *U. A. W.* v. *WERB* (1956), 351 U. S. 266.

† *U. S.* v. *Brennan*, D. C. Minn. (1955), 134 F. Supp. 42, 47.

hibiting bribery, extortion or any form of dishonesty . . ." serves to emphasize Appellant's position that the section is part and parcel of the complete plan of federal regulation of the labor-management relations field, the substance of which has, in every case since *Garner,* been held to be beyond the pale of state action.

(Resp., p. 11) The use of the phrase "coincidence means invalidity" is an attempt on the part of Respondent to oversimplify the contention of Appellant. The Appellant's contention is that "coincidence is as ineffective as opposition when Congress has taken the particular subject matter in hand."*

(Resp. p. 11) Respondent speaks of the absence of substantial conflict. Appellant has heretofore pointed out the potentialities of conflict, but in any event it is unnecessary that Appellant show conflict because that becomes relevant only where Congress has occupied but a limited portion of the field. The federal statutes here in issue so blanket the particular field as to leave nothing whatever to the states.

(Resp., p. 11) The citation of the Federal Anti-Racketeering Act (18 USC 1951) is inapposite, for by Section 3231 of Title 18, Congress has affirmatively disclaimed an intent to preempt the operation of state law. It is to be noted that Section 302 of the Taft-Hartley Act is not a part of Title 18.

(Resp., p. 12) The fact that the Grand Jury was investigating crimes of extortion and conspiracy as well as the crime of bribery does not detract from Appellant's position. Certainly the crime of extortion as limned by the facts in this case involves the payment of money by an employer to a labor representative; so does the crime of conspiracy.

---

* *Charleston etc. R. Co.* v. *Varnville,* 237 U. S. 597, 604.

In sum, the question is novel and based upon novel Federal entrance into a segment of a field heretofore regulated only by the states. The remainder of the field has been held preempted by a solid line of decisions of this court. The state statutes claimed to be repugnant regulate identical aspects of identical conduct.

Conclusion.

The motion should be denied and a notation of probable jurisdiction entered.

Dated: New York,
July 30, 1957.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York, N. Y.

Of Counsel:
WILLIAM J. KEATING.